APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MERRITT-CHAPMAN & SCOTT CORPORATION

Plaintiff

against

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON

Defendant

Cleary, Gottlieb & Steen, New York City, for plaintiff, William L. Lynch, James W. Lamberton, Dennis J. Kenny, New York City, of counsel.

Root, Barrett, Cohen, Knapp & Smith, New York City, for defendant appearing specially, Washington & Wickwire, Ephrata, Wash., Whitman Knapp, New York City, Nat W. Washington, Ephrata, Wash., Neal J. Hurwitz, Edmund R. Schroeder, New York City, of counsel.

NOONAN, District Judge.

This is a motion by defendant, Public Utility District No. 2 of Grant County, Washington, made pursuant to Rule 12(b), Federal Rules of Civil Procedure, 28 U. S.

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C. A. Defendant, appearing specially,[1] moves the court for an order:

1) vacating a warrant of attachment and setting aside the levy thereunder upon the Bankers Trust Company and

2) setting aside the service of summons on the ground that the property and credits alleged to have been attached were not subject to attachment and, in any event, were not the property of or credits of defendant.

Public Utility District #2 of Grant County, Washington, was established by vote in 1938 and has its headquarters at Ephrata, Washington. Since January 1942, the District has owned and operated an electric distribution system serving all of the populated areas of the County. This system is referred to as the Distribution System. The financing operation and ownership of the Distribution System was consolidated under Resolution No. 75 of the District which provides among other things that the District may incur indebtedness to finance the acquisition or construction of additional generating transmission and distribution facilities. "As permitted, * * * the District has established the Production System for the purpose of financing the construction of the Priest Rapids Development by the issuance of the Bonds, the funds, properties, operations and business of which shall be accounted for separately from those of the Distribution System. The Production System is not a separate legal entity but is in the nature of an operating division of the District under the control of the Commission", which administers the District. (Official Statement, page 2).

1. See Rule 12, Federal Rules of Civil Procedure Commentaries Sec. 4 on the subject of special appearances.

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In 1954, Congress granted the District the right to develop the Priest Rapids Hydro-Electric Project on the Columbia River under a license issued pursuant to the Federal Power Act. On November 4, 1955 and June 1, 1956, the Federal Power Commission granted the District a license permitting the District to develop, construct, operate and maintain as a single project the Priest Rapids Hydro-Electric Project consisting of (1) the Priest Rapids Development, and (2) the Wanapum Development at a site approximately 18 miles upstream from the Priest Rapids Development site.

In order to finance the development, revenue bonds were authorized in the amount of $166,000,000. These funds so acquired were then placed in various funds to wit, the Bond Fund, Revenue Fund, Renewal Fund, Replacement Fund, Construction Fund and Construction Interest Fund. The subject of this motion concerns only the last two funds on deposit in Bankers Trust Company in New York, which have been attached.

Prior to entering into any contract for construction of the Priest Rapids Development, the District and twelve public and private electric utilities (the "Purchasers") entered into power sales contracts. Under these contracts, which will not expire until October 31, 2005, the Purchasers will buy 63.5% of the output of the Production System; the District has reserved 36.5% of the power output for its own Distribution System and for sale to others.

The twelve purchasers operate private and public electric utility systems in the states of Washington, Oregon, Idaho, Montana and Wyoming. Taus approximately ⅔ of the output of the Production System was sold by the District for a term of 40 years. The power reserved by the

District for itself and for sale to others was estimated in 1956 to amount to 230,242 kw. In 1955, the District's own Distribution System had a maximum demand for 63,006 kw.

On July 9, 1956 pursuant to competitive bid and award, Merritt-Chapman & Scott Corporation, plaintiff herein, a Delaware corporation with its principal offices in New York, New York, entered into a contract with the defendant District for the construction of the Priest Rapids Dam. A construction period was established that would result in completion of the Production System by October 1961.

On September 28, 1961, the District's construction engineers certified to the District that construction of the dam by Merritt-Chapman & Scott Corporation was completed. When the District refused to pay over the funds claimed by Merritt-Chapman & Scott Corporation to be due upon completion of construction, Merritt-Chapman & Scott Corporation commenced suit against the District in the New York Supreme Court.

On March 7, 1962, the New York Supreme Court issued a warrant of attachment against funds of the District in New York, and a levy was made thereunder on funds on Deposit with Bankers Trust Company, New York, New York. Subsequently, the summons and verified complaint were duly served upon the District, and on March 26, 1962, this cause was removed to this Court by the District.

It is the position of the defendant that:

a) Public Utility District #2 is a political subdivision of the State of Washington, is "engaged in the performance of essential functions," and, therefore, its property is immune from attachment.

b) Public Utility District #2 further maintains that its funds now on deposit with Bankers Trust Company are trust funds and therefore not property subject to attachment.

The court will address itself to the first of the two arguments set forth by the defendant. There seems to be little doubt concerning governmental status of Public Utility District #2. The basic enabling legislation enacted in 1931 by the people of the State of Washington established the District as a political subdivision and municipal corporation of the State. In Public Utility District No. 2 of Grant County v. Washington State Power Commission, 46 Wash. 2d 233, 280 P. 2d 264 (1955), the Supreme Court of the State of Washington declared Public Utility District #2 to be a "political subdivision of the state."

Public Utility Districts in Washington have been empowered to levy and collect taxes within their respective geographical limits. The districts are to be governed by commissioners elected by the people at general elections. All of the above clearly point to the fact that Public Utility District #2 was and is to be considered a political subdivision of the State.

Whether or not the property of a municipal corporation is subject to foreign attachment appears to depend upon whether such property is derived from a proprietary function engaged in by the municipal corporation. The law is clear in New York that funds of a municipal corporation collected through ordinary governmental means for local purposes cannot be the subject of attachment. Thus in Van Horn v. Kittitas County, Wash., 28 Misc. 333,

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59 N. Y. S. 883 (Sup. Ct. N. Y. Co. 1899), aff'd 46 App. Div. 623, 61 N. Y. S. 1150, the court in vacating the levy of attachment stated:

> "It appears that the treasurer of the defendant (Kittitas County), in the performance of his duties remitted to the Chemical Bank, in the city of New York, a sum of money for the payment of coupons, representing interest about to fall due on certain bonds which had been issued by the defendant, and which, by the terms of the coupons, was payable at that bank. This money had been raised by taxation, and had been appropriated for the payment of interest in question. It is true that there was nothing in the arrangement between the defendant and the bank which constituted the latter a trustee for the holders of the coupons, so as to give such holders an interest in the fund which could be enforced against the bank * * *. The bank was the mere agent of the defendant or of its treasurer, and the money was subject to recall at any time before it was applied to the purposes for which it had been remitted so that it continued to be the exclusive property of the defendant. It was not, however, the property of the county, in any private or proprietary sense, but was acquired by it for a public purpose, in the exercise of its political powers, and was appropriated for a specific purpose, inconsistent with its use for the discharge of the plaintiff's claim. * * * It is well settled that property thus acquired, held, and appropriated by a public corporation is not subject to levy. In support of this proposition it is sufficient to cite 1 Dill. Mun. Corp. §100, where the learned author says:

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> "'The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work.' Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its creation thwarted. Based upon considerations of this character, it is the settled doctrine of the law that not only the public property, but also the taxes and public revenues of such corporations, cannot be seized under execution against them, either in the treasury, or when in transit to it. * * * The doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt, and has no means of payment but the taxes which it is authorized to collect.'"

Where, however, it has been shown that property of a municipal corporation has been acquired through a proprietary venture; the courts in New York have allowed a levy of attachment on such property. In Harman v. City of Ft. Lauderdale, 134 Misc. 133, 234 N. Y. S. 196 at p. 198 (Sup. Ct. N. Y. Co. 1929), the court stated:

> "This levy under this valid attachment should be upheld, for the reason that the property and property rights so levied upon are, in my opinion, clearly property of the Broward County Port Authority, which it holds in a private and proprietary capacity, as distinguished from a governmental and political capacity. * * * In my opinion such functions are private and proprietary, and the operation, control, and management of a harbor district improvement within the powers here conferred upon this Port Authority essentially are not governmental or political functions, but

> are in the nature of a private business enterprise engaged in with the hope of revenue. The courts in this state have frequently recognized the distinction between those activities of a municipal corporation which are governmental in character and those which are commercial."

Likewise in Doyle v. City of Astoria, Oregon, 147 Misc. 127, 262 N. Y. S. 572 (Sup. Ct. N. Y. Co. 1932), aff'd 238 App. Div. 833, 262 N. Y. S. 973, the Court allowed the funds of a municipal corporation raised through a proprietary venture to be attached

We come now to what this court considers the central point on the motion, that is, whether the activities of Public Utility District #2 constitute local governmental duties or whether such a venture is private and proprietary in nature with the resulting consequence that any funds derived from the activity may be considered proper subject matter for attachment.

As the Supreme Court said in Brush v. Commissioner, 300 U. S. 352, at p. 365, 57 S. Ct. 495, at p. 498, 81 L. Ed. 691:

> "We thus come to a situation, which the courts have frequently been called upon to meet, where the issue cannot be decided in accordance with an established formula, but where points along the line 'are fixed by decisions that this or that concrete case falls on the nearer or farther side.' Hudson [County] Water Co. v. McCarter, 209 U. S. 349, 355 [28 S. Ct. 529, 531, 52 L. Ed. 828]. We are, of course, quite able to say that certain functions exercised by a city are clearly gov-

ernmental—that is, lie upon the nearer side of the line —while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court has called the gradual process of historical and judicial 'inclusion and exclusion.' Continental [Illinois] Bank [& Trust Co.] v. Chicago, R. I. & P. Ry. [Co.], 294 U. S. 648, 670 [55 S. Ct. 595, 603, 79 L. Ed. 1110], and cases cited."

When Public Law 544, 83d Congress Chapter 589— 2d Session H. R. 7664, 68 Stat. 573 was passed by Congress permitting the development of Priest Rapids Dam, it was foreseen that such a project would provide navigation locks and effective flood control for that area in which it was to be built. Such projects are certainly governmental in nature. The fact that the navigational locks, as yet have not been installed seems to be an engineering problem and not cause for suggesting that their installation will never be effected.

It would seem that the principal basis for plaintiff's position that Public Utility District #2 is acting in a private and proprietary manner stems from the executed Purchaser's Contracts; (noted above), and the resulting funds acquired therefrom.

The presence of a governmental agency in the field of producing electricity is not a novel approach to fulfilling this public need. In New York State we have the Power Authority of the State of New York created,

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> "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state * * *." §1001 of the Public Authorities Law of New York (McKinney's Consol. Laws, c. 43-A, Vol. 42, Part 1).

The Court can see no prejudice to the Public Utility District #2 position as a governmental agency operating an essential governmental function from the fact that it has entered into various contracts to sell the power developed by the Production System. Public Law 544, Sec. 6, provides:

> "such license shall provide that the licensee shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighborhood States * * *."

The percentages of power to be so appropriated were carefully determined by engineers, based on the productivity of the development. With respect to the funds received for such allotments it is the opinion of this court that they do not represent profits from a venture, under the law as found in Harman v. City of Ft. Lauderdale, supra. The contracts in question provide that the Purchasers each year agree to pay the cost of the power allocated to it.

These contracts provide that before the beginning of each contract year the District shall estimate the cost of production: that each "Purchaser" shall pay its share of such estimated cost in equal monthly installments through-

out the year; that after the end of each year an audit shall be made to determine the year's actual costs; and that, upon submission of each audit, each "Purchaser" shall either make up any deficiency resulting from an inadequate estimate or receive a credit for any balance that may have resulted from an excessive estimate. The cost of production includes, of course, the establishment and maintenance of adequate reserves and working capital.

At the expiration of the fifty year contract term, all such "working capital and all reserves" will be distributed pro rata among the Purchasers.

On the subject of profits the court is reminded of what the Supreme Court stated in Brush v. Commissioner, supra, 300 U. S. at p. 372, 57 S. Ct. at p. 501:

> "Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true, stamps the operation as private and not governmental in character. We first pause to observe that the overhead due to the enormous cost of the system, and the fact that so large a proportion of the water is diverted for public use, rather plainly suggests that no real profit is likely to result. And to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized."

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After a careful consideration of the various other points raised on this motion, it is the opinion of this court that Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture. As such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment. The court, in the light of this conclusion, finds it unnecessary to determine the trust status of these funds.

Levy of attachment is hereby vacated, and service of the summons set aside.

So ordered.

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Original opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 164—October Term, 1962

(Argued December 10, 1962 Decided April 22, 1963)

Docket No. 27783

MERRITT-CHAPMAN & SCOTT CORPORATION,
Plaintiff-Appellant,

against

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Defendant-Appellee.

Before:

MEDINA, WATERMAN and SMITH, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Gregory F. Noonan, Judge.

Plaintiff, Merritt-Chapman & Scott Corporation, appeals from an order setting aside an out-of-state service of summons, and vacating a warrant of attachment and a levy thereunder upon funds on deposit with Bankers Trust Company, of New York City, for the account of defendant,

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Public Utility District No. 2 of Grant County, Washington. Opinion below reported at 207 F. Supp. 443. Reversed and remanded.

William L. Lynch, New York City (James W. Lamberton, Dennis J. Kenny and Cleary, Gottlieb, Steen & Hamilton, New York City, on the brief), for plaintiff-appellant.

Whitman Knapp, New York City (Nat W. Washington, Ephrata, Wash., Edmund R. Schroeder, Neal J. Hurwitz and Root, Barrett, Cohen, Knapp & Smith, Leonard Sims, Paul R. Herman, New York City, and Washington & Wickwire, Ephrata, Wash., on the brief), for defendant-appellee.

Orison S. Marden, A. Hayne deYampert and White & Case, New York City, for Bankers Trust Co., as amicus curiae.

Louis J. Lefkowitz, Atty. Gen. of New York, Samuel A. Hirshowitz, First Asst. Atty. Gen., and Sheldon Raab, Deputy Asst. Atty. Gen., New York City, amicus curiae.

MEDINA, *Circuit Judge*:

This is an action to enforce a New York contract dated July 9, 1956 between plaintiff-appellant, Merritt-Chapman & Scott Corporation, a Delaware contractor with principal offices in New York City, and defendant-appellee, Public Utility District No. 2 of Grant County, Washington, a municipal corporation formed under the laws of the State of Washington. On March 7, 1962 a warrant of attachment

was issued by the New York Supreme Court, New York County, and a levy made upon certain funds on deposit with Bankers Trust Company, in New York City, for the account of the District. Service of the summons and verified complaint was subsequently made upon the District at Coulee City, Washington. On March 26, 1962 the District removed the action to the United States District Court for the Southern District of New York on grounds of diversity of citizenship, and prior to answer moved to vacate the warrant of attachment and the levy thereunder and to set aside the service of summons on the ground that the funds on deposit with the Bank are immune from attachment levy under the doctrine of governmental immunity, or, alternatively, are trust funds and therefore not property subject to attachment. As there is no *in personam* jurisdiction, the out-of-state service of summons must be set aside and the case dismissed if the levy is unauthorized and illegal. Judge Noonan vacated the levy and set aside the service of summons because he found the activities of the District to be "governmental" and not "proprietary," and accordingly held the District entitled to immunity. He did not pass upon or discuss the trust fund theory. The opinion below is reported at 207 F. Supp. 443.

I

The Facts

Defendant-appellee, Public Utility District No. 2 of Grant County, Washington, was established in 1938 pursuant to a general statute providing for the creation of "public utility districts," enacted in 1931 by the people of the State at a general election pursuant to an initiative

petition. Revised Code of Washington, Title 54.04.020. Its headquarters are at Ephrata, Washington, and it is co-extensive with Grant County, Washington, which had a population of 39,300 persons in 1955. The District is governed by five Commissioners elected by the people of Grant County at general elections. The District can sue and be sued under Washington law, but its property is not subject to execution, the method of enforcement of judgment being by request or mandamus to the proper District officer. Revised Code of Washington, Titles 54.16.110, 6.04.140, 6.04.150. The District is empowered for all corporate purposes, including the construction of facilities to provide its inhabitants and others with electric power and navigation and other water services, both to issue revenue bonds and to levy and collect general taxes on property within its geographical limits regardless of whether the property owner is served directly by the District. Revised Code of Washington, Titles 54.16.030-54.16.080, 54.24.018.

The purpose of Washington public utility districts, which the Washington courts have declared to be "political subdivision[s] of the state" (*Public Utility District No. 2 of Grant County* v. *Washington State Power Commission*, 1955, 46 Wash. 2d 233, 234, 280 P. 2d 264, 265), is to "conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses." Laws 1931, c. 1, §1; Revised Code of Washington, Title 54.04.020. Since January, 1942 the District has owned and operated an electrical distribution system serving in 1956 more than 13,000 customers located within Grant County. On August 2, 1945 the District adopted Resolution No. 75 which provides that the District, pur-

suant to the authority of the basic enabling statute, may incur indebtedness to finance the acquisition or construction of additional generating, transmission and distribution facilities to meet the growing power needs of Grant County and the State of Washington. These additional facilities were to constitute an operating division of the District, but under separate accounting procedures and revenues from the facilities might be pledged to the retirement of the indebtedness. Thereafter, the District became interested in the development of a hydro-electric project at the Priest Rapids site on the Columbia River, and its financial and other activities in relation thereto and the contract which it entered into with Merritt-Chapman & Scott Corporation, constitute the subject matter giving rise to this litigation.

The development of the Columbia River for comprehensive purposes of public benefit, including electric power production, navigation and flood control, was long a matter of concern by both the federal and Washington State governments. Thus in 1925 a full report was prepared by the United States Army Corps of Engineers. House Document No. 308, 69th Cong., 1st Sess. Section 204 of the Flood Control Act of 1950 (Public Laws 516, 64 Stat. 170, Laws of the 81st Cong., 2d Sess., c. 188) lists the "Priest Rapids Dam, Columbia River, Washington" as one of the "works of improvement for the benefit of navigation and the control of destructive flood waters" authorized to be prosecuted under the direction and supervision of the Secretary of the Army and the Corps of Engineers. In 1952 the District applied to the Federal Power Commission for a permit to investigate this site, and in 1954 Congress enacted Public Law 544 (Laws of 83rd Cong., 2d Sess., c. 589), Section 1 of which modified the 1950 Act to permit the District

specifically, or "any division, subdivision, agency or commission of the State of Washington" to proceed with the project under terms and conditions of a license to be procured from the Federal Power Commission. Section 2 specified that the site shall be developed "as a part of the comprehensive plan for economically feasible control and utilization of the water resources for flood control, navigation, power, and other beneficial purposes." Section 4 provided that navigation locks and flood control features should be provided at federal expense. Section 5 provided that, at the request of the District, the Corps of Engineers would acquire "lands, easements, rights-of-way or other interest in land in accordance with federal laws and procedures governing flood-control projects and subsequent conveyance thereof to the licensee." The District's affidavits state that "in point of fact, the Corps of Engineers has acted and is still acting as the land acquisition agency for the defendant District." Section 6 provided that the licensee "shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighboring States." A requirement that preference be given to governmental agencies and cooperatives was eliminated from the Act as unnecessary "upon the premise that public bodies organized as nonprofit agencies to perform a public purpose could be entrusted with the responsibility of conducting their operations in the best public interest." Senate Report No. 1656 to accompany H. R. 7664, page 4, 83rd Cong., 2d Sess. (1954).

In 1955, the Federal Power Commission granted the District a fifty-year license permitting it to develop the Priest Rapids site through the construction of two projects: the Priest Rapids Development and the Wanapum Develop-

ment at a site 18 miles upstream from the Priest Rapids Development. The license authorized the District to build and operate the Priest Rapids Development and the upstream Wanapum Development as a multipurpose project, integrated with the Columbia River Basin comprehensive plan, and to serve functions of power generation, flood control, navigation and migratory fish passage. Specific requirements in the license for the non-power functions include: adequate provisions for passage of upstream fish migrations; provisions to facilitate future installation of navigation locks; provisions for flood control storage by drawing the reservoirs down below normal operating levels, with compensation to the District by the federal government for reduced power output as a consequence of lowered reservoir levels. The District was required by the license to begin construction of the Priest Rapids Development by July 1, 1956 and to complete construction by September 12, 1961, subsequently extended to July 1, 1958 and September 12, 1963 respectively. This litigation concerns only the Priest Rapids Development although it may be noted in passing that the District has issued $195,000,000 of revenue bonds for the Wanapum project.

Early in 1956 the District advertised for sealed bids on the Priest Rapids Project and subsequently entered into a contract with the Contractor as low bidder at $91.9 million (estimated in 1956 as 94% or 96% of the cost of construction work, equipment, supplies and installation) dated July 9, 1956 in New York City, to perform labor and services and furnish materials for construction of the dam, power plant and appurtenances for the Priest Rapids Project on the Columbia River in accordance with plans furnished by the Harza Engineering Company of Chicago. The contract established a construction period of 1968

days, with the expectation that work would commence shortly upon execution, and with bonus and penalty provisions for variations from the construction period. A 50% performance bond was posted by the Contractor. Agreements supplementing the contract were entered into by the parties subsequently, and on September 28, 1961 the District's Construction Engineer certified to it that the Contractor had completed its work under the contract. The uncontradicted affidavits before us state that ten generating units, the full requirement under the contract, are now in commercial operation by the District. The navigation locks and other non-power features of the Priest Rapids Project have apparently not yet been undertaken.

Prior to entering into the construction contract, the District negotiated identical power sales contracts with eight public and four private utilities serving the States of Washington, Oregon, Idaho, Montana and Wyoming, whereunder the District agreed to sell and the utilities to purchase at cost 63.5% of the Priest Rapids Development output during the term of the District's license, with 36.5% being reserved to the District for its own use, or for sale to others, this balance constituting more than enough to fulfill the expected power needs of Grant County during the term of the license. As the court below found, the percentages of power allocated to the respective purchasers were "carefully determined by engineers, based on the productivity of the development," in attempted compliance with the requirement of Public Law 544 that a "reasonable portion of the power output of the project" be offered for sale "within the economic market area in neighboring States." Upon approval of the plan by the Federal Power Commission, the contracts were executed and placed in escrow pending completion of financial arrangements by the District.

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Under the power sales contracts, power is to be delivered by the District at the dam itself, located within Grant County, or, at the option of the purchaser, at the Midway Substation of the United States Government's Bonneville Power Administration in Washington, seven miles from the dam but outside the confines of Grant County. At present, power is being delivered at the Midway Substation.

The contracts also provide that "in order that the Purchasers may, in an orderly way, participate in problems relating to the Priest Rapids Development," a Purchaser's Advisory Committee is created to meet monthly with the District to discuss and make recommendations with reference to the project. Written recommendations must be rejected in writing with reasons given, and two-thirds of the Committee may compel the District to submit to arbitration various matters relating to the operation and financing of the project "except such matters which are by law vested exclusively in the discretion of the District." The parties have agreed to be bound by arbitration "insofar as the parties hereto may legally do so." It is also provided that the remainder of the contract provisions are severable from the arbitration provisions should these be found to be contrary to law.

While the District may have "earnings" or "revenue" from the operation of the Priest Rapids Production System, this is solely in the accounting sense that income exceeds expenses, and all such revenues must be applied either to retire indebtedness, to establish working capital and reserves for expansion and contingencies, or to reduce or stabilize rates.

In order to finance the Priest Rapids Project, the District sought to issue revenue bonds, and negotiations were

entered into between the District and underwriters headed by Halsey, Stuart & Co. Inc. representing prospective bondholders. As a result of these negotiations, agreements were reached, embodied in District Resolution No. 313, dated June 19, 1956, the Bond Resolution, providing for the issuance of $166,000,000 face value revenue bonds, with direct payment to the District of $1,250,000 as reimbursement for costs and expenses of preliminary investigations and reports and $3,000,000 in working capital. The underwriters, however, would not subscribe for the issue unless special arrangements were devised for the protection of the bondholders. On the other hand, the District sought to comply with the Washington statute which provided that "the treasurer of the county in which the utility district is located shall be ex officio treasurer of the district and all district funds shall be paid to him * * *." Enacted Laws 1955 ch. 124 § 7, p. 549, predecessor of Revised Code of Washington, Title 54.24.010. As a result of negotiations entered into to harmonize these conflicting purposes, the following financial arrangements were arrived at and ultimately accepted and are embodied in the Bond Resolution.

Five separate funds were created: (a) Construction Fund; (b) Construction Interest Fund; (c) Revenue Fund; (d) Bond Fund; and (e) Renewal and Replacement Fund. Chemical Corn Exchange Bank of New York City was designated and signified its acceptance as "Bond Fund Trustee." Bankers Trust Company of New York City was designated and signified its acceptance as "Construction Fund Trustee." At the date of closing, July 9, 1956, the purchasers delivered a check in the amount of $149,009,500 to the order of "Bankers Trust Company, Con-

struction Fund Trustee," with instructions to deposit $33,484,379 to the Construction Interest Fund and $115,525,121 to the Construction Fund. The transfers were so made, and the books of Bankers Trust Company identified the funds as follows:

> "Bankers Trust Company Construction Fund Trustee Public Utility District No. 2 Grant County, Washington—Construction Fund Account".
>
> "Bankers Trust Company Construction Fund Trustee Public Utility District No. 2 Grant County, Washington—Construction Interest Fund Account".

It was provided that the Construction Fund Trustee could be removed without cause by 60% of the bondholders, and for cause by the District. (Section 11.)

The Construction Interest Fund was to be used "for the payment of interest on the Bonds during the period of construction of the Production System." The Construction Fund Trustee was to transfer funds to the Bond Fund Trustee who would make these payments directly. (Section 13.)

The Construction Fund was to be used for "payment of the cost of acquisition and construction of the Production System," with a number of illustrative items specified.[1]

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1 "A. Obligations incurred for labor and materials and to contractors, builders and to materialmen in connection with the construction of the Production System for machinery and equipment, excavations, cofferdams, fill, and for the restoration or relocation of property damaged or destroyed in connection with such construction;

B. The cost of acquiring by purchase, if such purchase shall be deemed expedient, and the amount of any award or final judgment in or any settlement or compromise of any proceeding to acquire by condemnation or by the exercise of the power of eminent domain, such lands, property, rights, rights-of-way, franchises, easements or other interests in land as may be deemed necessary or convenient by

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Bankers Trust Company could make payment from the Construction Fund only upon the written order of the District, signed by two officers thereof, with a certificate from the Construction Engineer employed by the District that the order represented an obligation properly incurred by the District. The Construction Engineer was required to be the Harza Engineering Company or some other firm "of national reputation, recognized for knowledge, skill and experience in the construction and operation of hydro-electric generating facilities," and the Construction Engineer could not serve as Consulting Engineer or in any

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the District for the construction and operation of the Production System, options and partial payments thereon, and the amount of any damages incident to or consequent upon the construction and operation of the Production System;

C. Interest on the Bonds not otherwise provided for accruing prior to the commencement of and during the Period of Construction;

D. The fees and expenses of the Construction Fund Trustee, the Bond Fund Trustee and of the Paying Agents for all services rendered under this resolution during the Period of Construction, and taxes or other municipal or governmental charges lawfully levied or assessed against the Production System or payments in lieu thereof, during the Period of Construction or any property acquired therefor and premiums on insurance in connection with the Production System during the Period of Construction;

E. The cost to the District of the performance of the duties of the Construction Engineer (appointed as hereinafter provided) with reference to the acquisition and construction of the Production System or the issuance of Bonds therefor;

F. Expenses of the District, salaries of the Commissioners of the District, legal expense and fees, cost of printing and of preparing and issuing the Bonds, wages of office and clerical employees, administrative management expenses, pension requirements, health and hospitalization insurance and all other items of expense not elsewhere in this section specified incident and properly allocable to the acquisition and construction of the Productions System and placing the same in operation (including the premiums on any insurance and fidelity bonds required or obtained during construction), including miscellaneous fees in connection with the acquisition of lands, rights-of-way, property, rights, franchises, easements, cost of abstracts of title, title insurance, cost of surveys and appraisals." (Section 14.)

other capacity. "Upon completion of acquisition and construction and after tests of equipment and facilities in accordance with standard practices," the Construction Engineer was to certify to the District and to the Construction Fund Trustee conformity of the Production System with final plans and readiness for normal and satisfactory operation. (Sections 15 and 16.)

The parties also agreed to the following (Section 17):

> "After the Construction Engineer has filed the certificate of completion of the Production System and after the District has accepted said Production System as completed and ready for continuous operation, and after all costs of acquisition and construction have been paid or, as to any costs not actually paid, the monies for the payment thereof have been set aside by the Construction Fund Trustee for that purpose, such balance of the monies then remaining in the Construction Fund and in the Construction Interest Fund shall be used by the Construction Fund Trustee as follows:
>
> A. Transfer any monies remaining in the Construction Interest Fund to the Construction Fund;
>
> B. Pay to the construction contractor from the Construction Fund, pursuant to the order of the District, any amount due under the construction contract by reason of having completed the Production System in advance of the completion date specified in said contract; and
>
> C. Transfer any monies remaining from such balance in the Construction Fund to the Bond Fund Trustee for credit to the Reserve Account in the Bond Fund."

Appendix A

The District agreed to pay revenues derived by it from ownership and operation of the Production System into a "Revenue Fund" and stated that "all of such monies shall be trust funds in the hands of the District" and should be used solely for the purpose of operating and maintaining the Production System and for making repairs, renewals, replacements, additions, extensions and betterments, and for the purpose of paying principal, interest, and premium, if any, on the bonds. (Section 19.)

A "Bond Fund" was also created to be held by the Bond Fund Trustee "solely for the purpose of paying the principal of and premium, if any, and interest on the bonds * * * and of retiring such Bonds prior to maturity in the manner herein provided." The source of such fund was to be revenues of the Production System, which were to be channeled into a number of accounts in the Bond Fund itself, including the "Reserve Account," into which $6,432,500 was originally paid, to be maintained at this level to make up any deficiency in the Interest Account of the Bond Fund. (Section 20.)

The "Renewal and Replacement Fund" was set up to be maintained at a level of $6,000,000 to make up deficiencies in the Bond Fund, or to pay for renewals, replacements, improvements and extensions or extraordinary operating and maintenance expenses of the Production System. The source of this fund was to be revenues in excess of those necessary to be paid into the Revenue Fund and the Reserve Account in the Bond Fund. (Section 22.)

The parties also agreed to the following terms:

> "The moneys in the Construction Fund and in the Construction Interest Fund, pending their application as provided in this resolution, shall be subject

to a prior and paramount lien and charge in favor of the holders of the Bonds issued and outstanding under this resolution and for the further security of the Bonds until paid out or transferred as herein provided." (Section 12.)

• • •

"The Bonds and the interest thereon shall be a valid claim of the holder thereof only against the Bond Fund and the amount of the revenues of the Production System of the District pledged to the Bond Fund, and shall constitute a prior charge over all other charges or claims whatsoever against the Bond Fund, and the Commission hereby finds and determines that in creating the Bond Fund due regard has been given to the cost of the operation and maintenance of the Production System, and that it has not obligated the District to set aside into the Bond Fund a greater amount of the revenues and proceeds of the Production System than in its judgment will be available over and above such cost of maintenance and operation." (Section 21.)

Upon approval of these arrangements by the Attorney General of the State of Washington the agreement was executed and the above-described payment by the bondholders and deposit into the Construction and Construction Interest Funds were made. On September 28, 1961 the Construction Engineer certified that the Contractor had completed its work on the Project, and the uncontradicted affidavits before us state, as we have already observed, that ten generating units, the full requirement under the contract, are now in commercial operation by the District.

The District, however, has refused to make certain payments claimed due and owing by the Contractor in the amount of $17,391,012 on the ground of fraud and other illegality in securing the contract, and for other reasons also not relevant to our task on this appeal; and the Contractor sought, on March 7, 1962, under the warrant of attachment to levy upon $18,891,051.31 in cash and securities still remaining in the Construction Fund, and $4,799,152.10 still remaining in the Construction Interest Fund.

Stating that "the central point" on the motion to vacate the attachment and levy and set aside the service of summons was "whether the activities of Public Utility District #2 constitute local governmental duties or whether such a venture is private and proprietary in nature," Judge Noonan vacated the attachment and levy and set aside the out-of-state service of summons, upon the finding that "Public Utility District #2 is a municipal corporation not engaged in a private and proprietary venture," and that "as such the monies, held by the Bankers Trust Company, in two funds, are not subject to attachment."

II

The Law

A

Preliminary

The Supreme Court's adoption on January 21, 1963, effective July 1, 1963, of an amendment to Rule 4(e) of the Federal Rules of Civil Procedure under which the federal district courts will be permitted to exercise an original *quasi-in-rem* jurisdiction has no effect on the pro-

cedure in the instant case under which initial steps were taken in the state court and the action removed to the federal court where, as in an ordinary diversity action, state law will be applied to determine the validity of the warrant of attachment and of the levy. 7 Moore, *Federal Practice*, Section 64.07 (2d ed. 1955); 3 Barron & Holtzoff, *Federal Practice & Procedure*, Section 1421 (1958 ed.); *Glaser* v. *North American Uranium & Oil Corp.*, 2 Cir., 1955, 222 F. 2d 552, 554. Since the issue of the validity of the warrant of attachment and of the levy in the instant case is a constitutionally procedural matter for New York conflict of law purposes (*Morris Plan Industrial Bank* v. *Gunning*, 1946, 295 N. Y. 324, 331-332, 67 N. E. 2d 510, 513; *Clark* v. *Williard*, 1935, 294 U. S. 211, 213), the first question for our consideration is the existence and nature of the limitation the New York courts would read into the attachment provisions of the New York Civil Practice Act, Sections 902, 903 and 912, based upon the District's claim of governmental immunity.[2] It is elementary that in deciding this question we do not consider the merits of the Contractor's claim nor of the defenses of the District, neither of which are invalid on their face. *Auerbach* v. *Grand National Pictures, Ltd.*, 176 Misc. 1031, 1033, 29 N. Y. S. 2d 747, 750 (Sup. Ct. 1941), affirmed, 263 App. Div. 712, 31 N. Y. S. 2d 670 (1st Dep't 1941), modified, 263 App. Div. 810, 32 N. Y. S. 2d 128, motion for leave to appeal denied, 263 App. Div. 807, 32 N. Y. S. 2d 129.

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2 The fact that the District possesses the capacity to sue and be sued under Washington law, and the other provisions of Washington law respecting the capacities of the District, are therefore not strictly controlling, although such might prove of interest to the New York courts in formulating the rule of New York law that is to govern this case.

Appendix A

Only three decisions by lower New York courts, two of which were affirmed by the Appellate Division on memorandum, have dealt specifically with this question. There is one additional federal district court case where an attempt is made to apply the New York law. *Van Horn* v. *Kittitas County, Wash.*, 28 Misc. 333, 59 N. Y. Supp. 883 (Sup. Ct. 1899), aff'd mem., 46 App. Div. 623, 61 N. Y. Supp. 1150 (1st Dep't 1899); *Harman* v. *City of Fort Lauderdale*, 134 Misc. 133, 234 N. Y. Supp. 196 (Sup. Ct. 1929); *Doyle* v. *City of Astoria, Ore.*, 147 Misc. 127, 262 N. Y. Supp. 572 (Sup. Ct. 1932), aff'd mem., 238 App. Div. 833, 262 N. Y. Supp. 973 (1st Dep't 1933); *Murdoch* v. *City of Asbury Park*, S. D. N. Y., 1942, 48 F. Supp. 18. We think it will be clear from the discussion in a later part of this opinion that these early cases, for a variety of reasons, cannot form a reliable basis for the formulation of the policy of the State of New York that governs the decision of this case. Therefore, mindful of our duty to use "all the available data" in implementing the rule of *Erie R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, we have resorted to the customary judicial process to determine and apply the state law in the case before us. *West* v. *American Tel. & Tel. Co.*, 1940, 311 U. S. 223, 236-237; *Bernhardt* v. *Polygraphic Co.*, 1955, 350 U. S. 198, 204-205; *Allen* v. *Cohen*, 2 Cir., 1962, 310 F. 2d 312, 315; *Strubbe* v. *Sonnenschein*, 2 Cir., 1962, 299 F. 2d 185, 188-189; *Nolan* v. *Transocean Air Lines*, 2 Cir., 1961, 290 F. 2d 904, cert. denied, 368 U. S. 901; *Cooper* v. *American Airlines, Inc.*, 2 Cir., 1945, 149 F. 2d 355, 359; *Summers* v. *Wallace Hospital*, 9 Cir., 1960, 276 F. 2d 831, 833-834. See Corbin, *The Laws of the Several States*, 50 Yale L. J. 762, 775 (1941); Clark, *State Laws in the Federal Courts: The Brooding Omnipresence of Erie* v. *Tompkins*, 55 Yale L. J. 267, 290 *et seq.* (1946).

Appendix A

B

SUMMARY OF REASONING OF OPINION

As the case was presented to us in the briefs of both appellant and appellee, with abundant discussion of what are called majority and minority views, and references to lines of decision said to be or not to be analogous, one would suppose it to be well-nigh impossible to formulate in precise terms the rule of policy of the State of New York that controls the decision of this case. As so often happens, however, we think legal analysis and adherence to principles of general application lead us to a satisfactory solution of the problem. Accordingly, and prior to a detailed discussion of the pertinent authorities, we have thought it proper to state the principles and the method of analysis by which we now decide this case.

We are not here concerned with the doctrine of sovereign immunity, as we would be if the defendant were a member of the family of nations or one of the sovereign states of the United States of America. We are concerned with a political subdivision of the State of Washington, created by statute, and falling in the same general category as municipalities, counties, villages, and a great variety of other state instrumentalities. These political subdivisions, created by the legislation of states, engage in a great variety of undertakings, thus presenting a wide spectrum of activities, ranging from the operation of the police force and the fire department down to miscellaneous small business undertakings. In the course of time a vast body of decisional law developed and many attempts were made to establish a formula to separate the cases in which the creditor was to be permitted to pursue his normal remedies from those in which the instrumentality was given immunity. Majority

and minority views were expressed and various interpretations given in particular cases of "governmental" as distinguished from "proprietary" functions. In some states, such as New York, the doctrine of governmental immunity for state instrumentalities has gone through several stages of development, with a distinct tendency to circumscribe more and more the instances in which immunity will be granted. From first to last, however, and almost universally in this country the basic test, however obscured by attempts to reconcile the irreconcilable, remained: If the creditor was permitted to pursue his remedies would this substantially interfere with the fulfillment by the instrumentality of the essential public functions for which it was created?

By a process of our own independent analysis we have arrived at the conclusion that sound legal reasoning compels a decision to the effect that in this particular *quasi-in-rem* proceeding the levy upon the funds of the District on deposit with Bankers Trust Company should be set aside and the funds deemed immune from attachment only if permitting such levy to remain in force would substantially interfere with the fulfillment by the District of its essential public functions. In the discussion that follows we have stated our reasons for holding that the New York courts would be of the same view, if this case were to be decided by the New York courts today.

In so holding, however, we do not dispose of the case, as Judge Noonan decided it on a different theory, and merely held that the District was immune from suit because its functions were of a "governmental" character. Accordingly, we reverse and remand for a determination by the District Court, of the critical issue: If the levy is permitted to stand will it substantially interfere with the fulfillment

by the District of its essential public functions? On this issue there is much to be said pro and con, as will appear in the ensuing treatment of the subject. We think the interests of justice require that the initial decision should be made below. In view of what is said in this opinion the parties may desire to submit further affidavits or a stipulation of facts. In this posture of the case we think the wise course for us to pursue with reference to the trust feature of the litigation is to leave that for consideration by the District Court on the remand. Indeed, a penetrating and thorough study of the effect of permitting the levy to stand, upon the carrying out of its essential functions by the District, may depend upon the proper construction to be given to the Bond Resolution. Moreover, if it is found on the remand that permitting the levy to stand will substantially interfere with the governmental functions of the District the levy will be vacated, and it will again be unnecessary to decide the trust aspect of the case.

C

Under New York Law the Activities of the District Were Governmental and Not Proprietary

The parties agree, and the New York authorities cited above make it clear that if the funds in question were related to "proprietary" rather than "governmental" activities of the District, the doctrine of governmental immunity cannot afford these funds an immunity from attachment levy. The Contractor's attempt to establish the "proprietary" nature of the District's activities, however, is not convincing. We agree with Judge Noonan's holding that the funds here were to be devoted to "governmental" purposes.

Appendix A

In a variety of situations the New York courts have explained that activities of a governmental body are "public" if they involve "a matter of State concern for the benefit of the people of the State" (*People ex rel. Buffalo & Fort Erie Public Bridge Authority* v. *Davis*, 1938, 277 N. Y. 292, 298, 14 N. E. 2d 74, 76), or if "essentially public and for the general good of all the inhabitants" or if for the "common good and general welfare of the people." *Sun Printing & Publishing Ass'n* v. *Mayor, etc. of The City of New York*, 8 App. Div. 230, 238, 40 N. Y. Supp. 607, 611 (1st Dep't 1896), affirmed, 1897, 152 N. Y. 257, 265, 46 N. E. 499, 500. Indeed, since a governmental body exists solely for the purpose of benefiting its people and providing for the general good, it is quite difficult to understand how any public body that is not acting *ultra vires* can function in any other than a public manner. The New York Court of Appeals long ago commented that it was difficult to "appreciate the distinction suggested between the public and private functions" of a governmental body. *Darlington* v. *City of New York*, 1865, 31 N. Y. 164, 199.

There is no doubt, however, that a distinction has been drawn, and with it has developed a considerable body of law on the differentiation between the "governmental" and the "proprietary" functions of public bodies. The distinction originally seems to have been developed in an attempt to mitigate the harsh rule that formerly prevailed holding governments immune from liability in tort for harm done by their officers and agents, and with the abandonment in New York of this unfortunate rule much of the basis for the distinction itself has disappeared. *New York City Transit Authority* v. *Loos*, 2 Misc. 2d 733, 739, 154 N. Y. S. 2d 209, 215-216 (Sup. Ct. 1956), affirmed,

3 App. Div. 2d 740, 161 N. Y. S. 2d 564 (4th Dep't 1957). See *Brush* v. *Commissioner*, 1937, 300 U. S. 352, 362-363 (often cited by New York courts for its discussion of the distinction between "governmental" and "proprietary" functions); *Port of Seattle* v. *International Longshoremen's & Warehousemen's Union*, 1958, 52 Wash. 2d 317, 319-320, 324 P. 2d 1099, 1101. Nevertheless, until the New York courts formally abandon the distinction in the field of governmental immunity from attachment levy, we are bound to honor and apply it as we think the New York courts would. *Cf. Scull* v. *District of Columbia*, D. C. Cir., 1957, 250 F. 2d 767, 768, n. 2, cert. denied, 356 U. S. 920.

Under Washington law the District is clearly a governmental body acting properly within its jurisdiction. *Public Utility District No. 2 of Grant County* v. *Washington State Power Commission, supra*, 46 Wash. 2d at 234, 280 P. 2d at 265. When we consider the nature of the activity undertaken by the District to meet the power needs of its inhabitants and thereby to promote the industry and the economic life of the community, even omitting consideration of the federal navigation and flood control aspects of the matter so intimately connected therewith, and when we survey the policy of the New York legislature and courts so often expressed, that similar activities of New York governmental bodies are "public" in nature,[3] and considering addition-

3 New York Public Authorities Law, Article 5, *passim*; *Easley* v. *New York State Thruway Authority*, 1956, 1 N. Y. 2d 374, 153 N. Y. S. 2d 28, 135 N. E. 2d 572; *New York City Tunnel Authority* v. *Consolidated Edison Co.*, 1946, 295 N. Y. 467, 68 N. E. 2d 445; *Bush Terminal Co.* v. *City of New York*, 1940, 282 N. Y. 306, 26 N. E. 2d 269 (Port of New York Authority); *People ex rel. Buffalo & Fort Erie Public Bridge Authority* v. *Davis*, 1938, 277 N. Y. 292, 14 N. E. 2d 74; *Gaynor* v. *Marohn*, 1935, 268 268 N. Y. 417, 198 N. E. 13 (Albany Light, Heat and Power District) (citing many examples at page 424, 198

ally the broad New York definitions of "public" activities in general, discussed above, and the liberal application of such definitions undertaken by the New York Court of Appeals in recent years (*Nehrbas* v. *Incorporated Village of Lloyd Harbor*, 1957, 2 N. Y. 2d 190, 194-195, 159 N. Y. S. 2d 145, 148-149, 140 N. E. 2d 241, 243-244), we are hard put indeed to find support for a holding that the "proprietary" classification, originating in a special and now principally outmoded context, is properly applicable to the activities of the District. We are told, however, that two of the principal New York cases cited above, as well as certain special features of the District's operations, compel a finding of "proprietary" activity. We have examined these contentions and we do not find them persuasive.

In *Harman* v. *City of Fort Lauderdale, supra*, 134 Misc. at 135, 234 N. Y. Supp. at 198, the court stated that the function of the governmental body there, the construction and maintenance of harbor improvements, was "private and proprietary." The cases cited in support of this determination generally involved operations of the New York City subway system and of various municipal waterworks, and either utilize the distinction in order to state a rule

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3 (Continued.)

N. E. at 15); *Robertson* v. *Zimmermann*, 1935, 268 N. Y. 52, 196 N. E. 740 (Buffalo Sewer Authority); *In re White*, 31 Misc. 2d 644, 222 N. Y. S. 2d 208 (Sup. Ct. 1961) (New York Power Authority); *Superintendent of Public Works* v. *Paonesso*, 14 Misc. 2d 787, 182 N. Y. S. 2d 223 (County Ct. 1958) (New York Power Authority); *Cuglar* v. *Power Authority of the State of New York*, 4 Misc. 2d 879, 163 N. Y. S. 2d 902 (Sup. Ct. 1957), affirmed, 4 App. Div. 2d 801, 164 N. Y. S. 2d 686 (3rd Dep't 1957), affirmed, 1957, 3 N. Y. 2d 1006, 147 N. E. 2d 733, 170 N. Y. S. 2d 341.

of governmental liability for negligence;[4] or the distinction is irrelevant because the decision is based upon some other principle or rule, such as that property cannot be taken without compensation[5] or that a statute imposed liability;[6] or the distinction is inapplicable because the holding is that the activity is governmental;[7] or the circumstances of the case were completely *sui generis*.[8] So far as the negligence cases are concerned, it may be noted that New York now agrees with the general viewpoint that they are in a class by themselves without real significance in other contexts. *Nehrbas v. Incorporated Village of Lloyd Harbor, supra*, 2 N. Y. 2d at 194, 159 N. Y. S. 2d at 148, 140 N. E. 2d at

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4 *Litchfield Construction Co.* v. *City of New York*, 1926, 244 N. Y. 251, 155 N. E. 116 (negligence causing pecuniary injury); *Lloyd* v. *City of New York*, 1851, 5 N. Y. 369 (this case involved the cleaning of sewers, concerning which see *Nehrbas* v. *Incorporated Village of Lloyd Harbor, supra*, 2 N. Y. 2d at 194-195, 140 N. E. 2d at 243-244, 159 N. Y. S. 2d at 148-149).

5 *In the Matter of the Board of Rapid Transit R.R. Commissioners of the City of New York*, 1909, 197 N. Y. 81, 90 N. E. 456.

6 *New York & Queens Electric Light & Power Co.* v. *City of New York*, 221 App. Div. 544, 224 N. Y. Supp. 564 (1st Dep't 1927).

7 *Sun Printing & Publishing Ass'n* v. *Mayor, etc. of the City of New York, supra*, 152 N. Y. 257, 46 N. E. 499; *Admiralty Realty Co.* v. *City of New York*, 1912, 206 N. Y. 110, 99 N. E. 241; *Matter of Low*, 1922, 233 N. Y. 334, 135 N. E. 521; *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. 333, 59 N. Y. Supp. 883.

8 *Moran* v. *Long Island City*, 1886, 101 N. Y. 439 (holding that a default judgment could be taken against a municipality as against any other corporation, based upon a finding of clear legislative intention to subject such body to this procedure); *Matter of City of New York*, 127 Misc. 710, 217 N. Y. Supp. 544 (Sup. Ct. 1926) (exception to general rule that adverse possession does not apply against governmental bodies, Annot., 55 A. L. R. 2d 554 (1957), in situation where municipality itself had conveyed the property and time ran while in possession of grantee; municipal market involved here).

243; *Burgess* v. *Kansas City*, 259 S. W. 2d 702, 703 (Mo. App. 1953). Further, in later cases New York has recognized the governmental nature of operations of the New York City subways and of municipal waterworks. *New York City Transit Authority* v. *Loos*, *supra*, 2 Misc. 2d at 737, 154 N. Y. S. 2d at 214; *Civil Service Forum* v. *New York City Transit Authority*, 4 App. Div. 2d 117, 163 N. Y. S. 2d 476 (2d Dep't 1957), affirmed, 1958, 4 N. Y. 2d 866, 174 N. Y. S. 2d 234, 150 N. E. 2d 705; *Wallerstein* v. *Westchester Joint Water Works No. 1*, 166 Misc. 34, 37, 1 N. Y. S. 2d 111, 114 (Sup. Ct. 1937). The authority of *Harman* and its applicability to the case before us is further weakened by other New York decisions which hold that navigation and harbor improvements, the subject matter actually involved in *Harman*, are matters of public concern and are governmental functions. *People* v. *Baltimore & Ohio R.R. Co.*, 1889, 117 N. Y. 150, 156-157, 22 N. E. 1026, 1027-1028; *Losei Realty Corp.* v. *City of New York*, 1930, 254 N. Y. 41, 47, 171 N. E. 899, 901. Moreover, the significance of this 1929 case dealing with harbor improvements for the case before us, in 1963, dealing with electric power production and related matters beneficial to the entire State of Washington and the whole Northwestern region of our nation, is significantly reduced by the fact that New York recognizes that the concept of "governmental" versus "proprietary" is a practical matter which varies with time and circumstances. *Nehrbas* v. *Incorporated Village of Lloyd Harbor*, *supra*, 2 N. Y. 2d, at 195, 159 N. Y. S. 2d at 148-149, 140 N. E. 2d at 243.

Finally, it may be noted that in the cases cited by *Harman* which hold or declare activities to be proprietary it appears that the courts believed the operations would be conducted for the purpose of earning "profit," in the

same manner that profit is earned by a business.[9] In the instant case, however, the record clearly establishes that sales under the purchase contracts will be entirely at cost, and that any "revenues" which the District may have in the accounting sense that income exceeds expenses will be expended to retire indebtedness, establish working capital and reserves for expansion and contingencies, or reduce or stabilize rates. It appears that in *Harman* the record did not establish this absence of business type "profit," and for this reason alone, without considering the federal governmental aspects of the matter, *Harman* is distinguishable from the case before us.

Doyle v. *City of Astoria, Ore., supra*, 147 Misc. 127, 262 N. Y. Supp. 572, is similarly distinguishable, for the holding that the municipal operation of a waterworks was "proprietary" seems to have been based on the belief that the record there established an operation for profit. We may note too that the authority of *Doyle* is considerably weakened by its reliance upon the same type of authorities as were cited in *Harman*,[10] and because of the changes in New York law on the very subject matter dealt with in the case itself.

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9. *In the matter of the Board of Rapid Transit R.R. Commissioners of the City of New York, supra*, 197 N. Y. at 96, 90 N. E. at 460; *Matter of City of New York, supra*, 127 Misc. at 723, 217 N. Y. Supp. at 557; *Litchfield Construction Co.* v. *City of New York, supra*, 244 N. Y. at 263, 155 N. E. at 119 (relying upon the *Rapid Transit R.R. Commissioners* case); *Lloyd* v. *City of New York, supra*, 5 N. Y. at 374 (relying upon cases stressing "private advantage" of the governmental body); *New York & Queens Electric Light & Power Co.* v. *City of New York, supra*, 221 App. Div. at 547-548, 224 N. Y. Supp. at 568-569 (relying upon the *Rapid Transit R.R. Commissioners* case and other cases stressing "profit" aspects).

10. The only new authorities cited are *Oakes Mfg. Co.* v. *City of New York*, 1912, 206 N. Y. 221, 99 N. E. 540 and *Canavan* v. *City of Mechanicville*, 1920, 229 N. Y. 473, 128 N. E. 682, both negligence cases which either stress or rely upon cases stressing the profit possibility.

Appendix A

We come now to the special features of the District's operations which the Contractor contends establish a "proprietary" classification. First, the Contractor notes that two-thirds of the power produced by the Project has been sold to purchasers for a fifty year period "and for delivery outside of the District's corporate limits." Second, under the purchase contracts the District's operation of the Project is subjected to certain arbitration procedures and this, we are told, is "incompatible with the exercise of governmental power by the District."

The Project was made possible only by virtue of the approval of the Congress and the Federal Power Commission, both of which bodies conceived of the Project as a part of a "comprehensive plan" for the development of the entire Northwestern region, considered the District to be operating as a "public body", and required it to devise a plan for the "equitable distribution" of the power produced by the Project. There is no doubt that the power sales contracts made in an attempt to comply with the federal mandate, principally with other governmental bodies, fulfilled the requirement of such an equitable distribution, and that the one-third output that remained available to the District more than met the estimated power needs of the District. In the light of the New York authorities which recognize that the product of governmental operations may be charged off to its users and contracts entered into for the sale of surplus output, such "commercial" aspects of the program being merely "incidental" to the ultimate governmental purpose of promoting the welfare of the community, the power purchase contracts in themselves hardly support the conclusion urged by the Contractor. *New York City Tunnel Authority* v. *Consolidated Edison Co.*, *supra*, 295 N. Y. at 476, 68 N. E. 2d at

449; *Bush Terminal Co.* v. *City of New York*, *supra*, 282 N. Y. at 321-322, 26 N. E. 2d at 276; 1957 Opinions of Attorney General (N. Y.), page 137. See *Brush* v. *Commissioner*, *supra*, 300 U. S. at 372-373.

Nor do we find significant the fact that the power sold to the various purchasers is delivered at a station "a long seven miles" from the territorial jurisdiction of the District for use in other states. So far as the District is concerned the primary purpose of the Project is to benefit the community it serves, and the State of Washington, and if along with this comes benefit to a number of surrounding states through the device of selling unneeded surplus power at cost, as part of an equitable distribution commanded by the federal authorities empowering the District to go ahead with the enterprise, all this is surely "incidental" within the meaning of New York law and does not convert the governmental function of the District into a proprietary one. *Cf. Simson* v. *Parker*, 1907, 190 N. Y. 19, 22, 82 N. E. 732, 733.

Nor do the arbitration provisions change the matter. It appears that these were inserted merely as a convenience to enable the purchasers to participate "in an orderly way" in the consideration of problems relative to the Project; and it was specifically agreed that arbitration should bind the parties only "insofar as the parties hereto may legally do so," and in any event would not cover "such matters which are by law vested exclusively in the discretion of the District." Moreover, it was agreed that the arbitration provisions, if found unenforceable, were to be severable from the remainder of the agreement. We are cited to, and have found no New York decision which suggests that under these circumstances the District's op-

erations in the instant case are denuded of their otherwise governmental character and reduced to a "proprietary" status because of these severable and incidental features, and we can perceive no reason why we should so hold. Indeed, the New York, and other authorities generally, suggest that arbitration is a perfectly proper device for governmental bodies having the capacity to contract. *Brady* v. *Mayor, etc. of Brooklyn*, 1 Barb. 584, 589-590 (Sup. Ct. 1847). See 17 McQuillin, *Municipal Corporations*, Section 48.20, page 127 (3rd ed. 1950); Annot., 40 A. L. R. 1370 (1926).

Before we leave the subject of the distinction between "governmental" and "proprietary" functions there is a further argument of the Contractor to be disposed of. In effect the contention is that to come under the doctrine of governmental immunity from attachment levy the District's activities must have been both "governmental and local." We find nothing in the decisions and comments of legal scholars that lends any support to the Contractor's argument. The phrase "neither governmental nor local" was used in *Harman* v. *City of Fort Lauderdale, supra*, 134 Misc. at 137, 234 N. Y. Supp. at 200, merely by way of incidental description in distinguishing certain authorities that the court found inapplicable to the case before it, and apparently on an entirely separate issue,[11] While this phrase

11 The court seemed to address itself to the issue of whether a foreign governmental body has a local situs so that it cannot be sued outside its own geographical bounds, and distinguished three cases thought relevant on this issue. *Parks Co.* v. *City of Decatur, Ill.*, C. C. A. 6, 1905, 138 Fed. 550, 553-554; *Board of Directors of St. Francis Levee Dist.* v. *Bodkin*, 1902, 108 Tenn. 700, 708-710, 69 S. W. 270, 271-272 (this case dealt with both the governmental immunity and the local situs problems); *Mayor, etc. of Baltimore* v. *Root*, 1855, 8 Md. (Perkins) 95 (the local situs issue actually seems not to have been raised here). See 17 McQuillin, *supra*, Section 49.15, pp. 177-182; Annot., 93 A. L. R. 500 (1934).

was repeated by the district court in *Murdoch v. City of Asbury Park, supra,* 48 F. Supp. at 23, it was entirely unrelated to the *ratio decidendi* in that case.

In a proper case the physical locus of the activities of a governmental body may be a relevant factor in determining whether its activities are truly "governmental" (cf. 18 McQuillin, *supra,* Section 53.100, pp. 414-415), but in the case before us we cannot agree that the fact that the power is distributed from a substation seven miles outside the District and that the Project as a whole affects several states and a wide area, renders the District's activities "proprietary." Nor can we understand why the activities of the district, which we hold to be governmental, should necessarily be beyond the province of the doctrine of governmental immunity from attachment levy because of the above-described incidental and non-local features.

D

WILL THE LEVY UPON THE FUNDS ON DEPOSIT WITH BANKERS TRUST COMPANY INTERFERE WITH THE GOVERNMENTAL ACTIVITIES OF THE DISTRICT?

This brings us to what we think is the heart of the case. Construction of the dam has been completed and the Project is now in active operation. The very funds now levied upon were specifically set aside for payments to contractors and others. If it be true that a levy upon these funds can have no detrimental effect upon the performance by the District of the activities we have already held to be governmental in character, how can there be any basis in principle, in this *quasi-in-rem* proceeding, for a holding that the doctrine of governmental immunity justifies or requires the vacation of the warrant of attachment, the setting aside

of the levy, and the dismissal of the action? We are also of the view that there can be no basis under New York law for such a ruling, if in fact a levy on these funds cannot in any substantial way interfere with the performance by the District of its public functions.

We start with the leading New York case, *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. 333, 59 N. Y. Supp. 883. *Van Horn* involved an attempt to attach funds of a Washington County held by a bank for the purpose of paying interest on County bonds shortly to become due and payable at the bank. The nature of plaintiff's claim does not appear in the opinion. The court vacated the attachment, stating as follows (28 Misc. at 335, 59 N. Y. Supp. at 884):

> "It was not, however, the property of the county in any private or proprietary sense, but was acquired by it for a public purpose, in the exercise of its political powers, and was appropriated for a specific purpose inconsistent with its use for the discharge of the plaintiff's claim. * * *. It is well settled that property thus acquired, held and appropriated by a public corporation, is not subject to levy. In support of this proposition it is sufficient to cite Dillon on Municipal Corporations, vol. 1, § 100, where the learned author says:
>
> 'The revenue of the public corporation is the essential means by which it is enabled to perform its appointed work. Deprived of its regular and adequate supply of revenue, such a corporation is practically destroyed, and the ends of its creation thwarted. Based upon considerations of this char-

acter, it is the settled doctrine of the law that not only the public property but also the taxes and public revenues of such corporations cannot be seized under execution against them, either in the treasury or when in transit to it'."

The significance of the above language is that in New York the doctrine of governmental immunity from attachment levy is based upon sound reasons of public policy, and it follows, naturally, that when the reasons for such doctrine cease to exist the doctrine itself is inapplicable. Thus in *Doyle* v. *City of Astoria, Ore., supra,* 147 Misc. at 128, 262 N. Y. Supp. at 573, the New York court recognized that "a foreign municipal corporation under ordinary circumstances will be treated like any other corporation, and the court will take jurisdiction." Again, in *Harman* v. *City of Fort Lauderdale, supra,* 134 Misc. at 137, 234 N. Y. Supp. at 200, the court recognized that a municipal corporation should ordinarily be subjected to "the same liability to suit and attachment as would apply in the case of a private corporation exercising the same functions."

This same principle, indeed, is evident from analogous principles of New York law. Thus it is familiar law that New York has made serious inroads upon the traditional doctrine of sovereign immunity from suit. New York Court of Claims Act, Section 8; *Bernardine* v. *City of New York*, 1945, 294 N. Y. 361, 365, 62 N. E. 2d 604, 605; *Miller* v. *Town of Irondequoit*, 243 App. Div. 240, 241-242, 276 N. Y. Supp. 497, 499 (4th Dep't 1935), affirmed, 268 N. Y. 578, 198 N. E. 412; *Benz* v. *New York State Thruway Authority*, 1961, 9 N. Y. 2d 486, 491, 215 N. Y. S. 2d 47, 49-50, 174 N. E. 2d 727, 729 (dissenting opinion), cert. dismissed, 1962, 369

U. S. 147. So too, under Section 684 of the New York Civil Practice Act, with certain limitations, a New York governmental body must respond in garnishment proceedings against earnings or income of its employees. And the broad language of Section 687-a of the New York Civil Practice Act ("against a person upon whom service of process may be had within the county") suggests that ordinary contract debts due and payable by a New York governmental body are similarly garnishable. Se 1952 Report of the New York Law Revision Commission, page 363; New York Civil Practice Act Section 228; 22 Carmody-Wait, *Cyclopedia of New York Practice*, page 75 *et seq.* (1956). While it has been held that public bodies in New York are immune from levy of execution, *Matter of Donner-Hanna Coke Corp.* v. *Eberhardt*, 156 Misc. 41, 42-43, 280 N. Y. Supp. 607, 609 (Sup. Ct. 1935), this principle traces back to considerations of public policy enunciated in *Darlington* v. *City of New York*, *supra*, 31 N. Y. at 191-192.

What, then, are the considerations of public policy that lie behind the doctrine of governmental immunity from levy under a warrant of attachment? Unfortunately, we have found no New York authority attempting a thorough exposition of the basic principles. In Annot., 89 A. L. R. 863, 864-865 (1934), however, the matter has been put as follows:

> "The exemption of municipal funds or credits from execution or process of garnishment is predicated upon three theories:
>
> (1) That municipal funds or credits collected for particular governmental purposes constitute a trust fund for the accomplishment of those purposes, from which they may not be diverted by any attempt of

municipal creditors to appropriate them to the satisfaction of their claims, thus defeating the fulfillment of the purposes for which they were collected. [Citing cases.]

(2) That to subject the municipal funds and property to levy of execution and garnishment would restrict, thwart, and interfere with the proper and orderly functioning of the municipal governmental machinery. [Citing cases.]

(3) That to allow an individual municipal creditor so to reach municipal funds for the satisfaction of his claim would effect a preference in favor of such creditor, to the prejudice of other creditors, and to the ultimate prejudice of the credit of the municipality. [Citing cases.]"

In a helpful article, Coffin, *Enforcement of Judgments Against Municipal Corporations*, 17 Chi-Kent L. Rev. 226, 233 (1939), the following appears:

"The funds of a municipality as well as its real and personal property may be essential to maintain necessary governmental functions, and public policy should prevent the subordination of public interests to the demands of creditors. The test here, as in other creditor actions should be the extent to which the assets pursued are vital to the efficient rendition of basic public services."

And see 10 McQuillin, *supra*, Section 28.57, pp. 147-156; Dillon, *Municipal Corporations*, §§248-249 (5th ed. 1911); 4 Am. Jur. *Attachment and Garnishment*, §§358-359 (1936). *Cf. Larson* v. *Domestic & Foreign Commerce Corp.*, 1949, 337 U. S. 682, 703-704.

Appendix A

If an attachment levy were allowed against funds of a governmental body set aside to meet its general governmental responsibilities, fulfillment by that body of its general governmental duties might well be seriously impaired. *Van Horn* v. *Kittitas County, Wash., supra*, 28 Misc. at 335, 59 N. Y. Supp. at 884. So too, it would be quite disrupting if an attachment levy were allowed against funds of a governmental body set aside to accomplish a specific government function, where the claim of the creditor is unrelated to the specific governmental function and the project has not yet been completed. *Cf. Darlington* v. *City of New York, supra*, 31 N. Y. at 191-192; *Leonard* v. *City of Brooklyn*, 1877, 71 N. Y. 498, 499-500. Further, if funds are set aside to meet specific debts to a number of specific creditors, such as bondholders on a government bond issue, allowing an attachment levy by one creditor to the prejudice of others might adversely affect the financial standing of the governmental body and thereby indirectly result in a substantial interference with its ability to carry out its governmental functions. See *Vanderpoel* v. *Borough of Mount Ephraim*, 1933, 11 N. J. L. 423, 168 Atl. 575, 89 A. L. R. 862; *Snower* v. *Hope Drainage Dist.*, W. D. Mo., 1933, 2 E. Supp. 931, reversed on other grounds *sub nom. Groner* v. *United States ex rel. Snower*, 8 Cir., 1934, 73 F. 2d 126.

On the other hand, if specific funds are set aside to meet a particular obligation owed to a particular creditor, and if the latter has totally performed his own obligations, it is difficult to appreciate how an attachment levy by this creditor on this fund would thwart the governmental body in any manner other than is ordinarily experienced when an individual or government must pay its just debts. Although we have found no New York authority on the

point, in analogous situations a number of authorities in other jurisdictions find quite significant the fact of the completion of a contractor's obligations, especially where a specific fund has been set aside to meet the governmental obligation on such contract. *City of Laredo* v. *Nolle*, 1886, 65 Tex. 359, 361 (questioned in *Willacy County Water Control & Improvement Dist. No. 1* v. *Abendroth*, 1944, 142 Tex. 320, 177 S. W. 2d 936); *Holston Union Nat. Bank* v. *Knox County*, 1942, 179 Tenn. 259, 264-266, 165 S. W. 2d 382, 384-385 (noted with approval in 17 Tenn. L. Rev. 880, 1943); *Portsmouth Gas Co.* v. *Sanford*, 1899, 97 Va. 124, 129, 33 S. E. 516, 517; *First Nat. Bank* v. *Mays*, 1927, 175 Ark. 542, 545-546, 299 S. W. 1002, 1003; *Wheeler* v. *Walter J. Bryson Co.*, 1931, 162 Tenn. 163, 168-171, 35 S. W. 2d 391, 392-393; *State* v. *Blake Realty Co.*, 1933, 88 Utah 584, 597-598, 20 P. 2d 871, 876-877, modified on other grounds, 1936, 88 Utah 600, 56 P. 2d 1347; *Boyd, Higgins & Goforth, Inc.* v. *Mahone*, 1925, 142 Va. 690, 695-696, 128 S. E. 259, 261-262; Fordham, *Garnishment of Public Corporations*, 39 West Va. L. Q. 224, 230-231 (1933). Contra: *Leake* v. *Lacey*, 1895, 95 Ga. 747, 22 S. E. 655; *Dow* v. *Irwin*, 1915, 21 N. Mex. 576, 157 Pac. 490 (dissenting opinion criticizes majority on this ground). Since New York would apparently allow a creditor of a contractor to garnish a contractual debt owed the latter by a governmental body under New York Civil Practice Act Section 687-a, there is no reason to suppose that New York would not allow the contractor himself to reach a fund specifically set aside for him, and consequently we think that in such a situation New York would hold the doctrine of governmental immunity from attachment levy to be inapplicable.

So much for general principles. We must now consider the particular facts in the record before us. It is useful

first to consider the situation which prevailed at the time the construction contract was entered into and before actual construction had begun. Two funds are involved in this case, the Construction Interest and the Construction Funds. The moneys in the Construction Interest Fund were to be used to pay interest on the bonds during the period of construction of the Production System, and $33,484,379 was initially deposited into such fund. The moneys in the Construction Fund were to be used to pay the cost of acquisition of the Production System, and the initial deposit to such fund was $115,525,121.

At this stage the Contractor's attachment levy of the Construction Interest Fund would surely have disrupted the delicate relationship existing between the district and the bondholders and might have impaired its financial standing to such a degree as to have rendered difficult or impossible the carrying out of other funding operations connected with this and other projects. So too, even though the amounts due this Contractor were estimated to be 94% or 96% of the total costs listed as payable out of the Construction Fund, an attachment levy upon the Construction Fund at this point, before the purchase of the necessary land or equipment or the actual beginning of construction and the other relevant work, would have threatened the Project to such a degree that the New York courts would almost certainly not have allowed the levy to stand. We think a similar result would follow at any point prior to completion of the power features of the Project, for any hitch or disruption pending completion of such a complex enterprise might well produce dire consequences.

We are told, however, that on September 28, 1961, the District's Construction Engineer certified to the District that construction by the Contractor was complete, and

we are told further that the Project, so far as its power features are concerned, is now in full operational use. As of March 7, 1962, the date upon which the levy was made, the value of the Construction Interest Fund and the Construction Fund were, respectively, $4,799,152.10 and $18,891,051.31. Section 17 of the Bond Resolution provides that after certification of completion by the Construction Engineer and acceptance by the District, and after payment or setting aside of the costs of acquisition and construction (and after payment of interest during the construction period), any surplus in the Construction Interest Fund should be transferred to the Construction Fund for payment of any bonus due the Contractor, and any balance in the Construction Fund should then be transferred to the Reserve Account in the Bond Fund to pay principal, interest, and premium, if any, on the bonds.

The significance of these additional circumstances, however, cannot be accurately gauged on the record before us because neither the parties nor the court below gave consideration to what we now find to be decisive of the case. Despite the fact that the principal construction work has been completed by the contractor, there may well be relevant work still to be done by others, payments to whom are provided in the Construction Fund. The navigation and flood control features have certainly not been completed and certain preliminary work may well have been done, payments for which may involve the Construction Fund. The affidavits of the District tell us that the Corps of Engineers "is still acting as the land acquisition agency for the District," but it is far from clear whether there is any relation between such work and the Construction Fund. Provision is made for payments to other persons listed under the Con-

struction Fund, such as the administrative staff, engineers, trustees and others performing various functions. Whether or not they have been paid does not appear. Data relative to interest payments is lacking and there is nothing to show what will be the significance, if any, of preventing surplus funds from moving to the Reserve Account in the Bond Fund. Thus, due to the way in which the critical issue has been submerged and disregarded by all concerned, we have no way of coming to a rational conclusion with respect to the practical consequences that may or will follow a decision that the attachment levy is valid. No fault is to be ascribed to counsel or anyone else for this unusual state of affairs. It is merely one of the very infrequent by-products of the decisional process, when new law is being developed and formulated.

A final comment may perhaps not be out of order. Like so many of the cliches and formulas so dear to the law in the days of our youth, the attempted distinction between "governmental" and "proprietary" functions may well have outlived whatever usefulness it ever had, and be on its way out of the law, and it is not unlikely that the scope of immunity enjoyed by state instrumentalities will be more and more restricted as time goes on. This need be no cause for lamentation. Some vestiges of governmental immunity will doubtless survive. We venture the prediction that the rule formulated by us this day, to the effect that a levy under an attachment in a *quasi-in-rem* proceeding against an out-of-state governmental instrumentality will be permitted to stand unless it effect will be substantially to interfere with the performance of the public duties of such instrumentality, rests on a solid foundation and will endure.

The order is reversed and the case remanded for further consideration by the District Court, not inconsistent with this opinion, and upon such further proofs and stipulations as the parties may be advised to submit.

Appendix A

First opinion on petition for rehearing

PER CURIAM:

Because of the novelty of some of the questions discussed in our opinion in this case, and the fact that there was little or no reference to these questions, or some of them at least, in the original briefs and on oral argument, we think it reasonable and proper to grant the parties an opportunity to file such further and supplemental briefs as they may desire. Main briefs must be filed on or before June 3, 1963, and answering briefs no later than June 10, 1963. We shall give the case further consideration after receiving these briefs. There will be no further oral argument. To the extent above indicated the petition for rehearing is granted.

Appendix A

Second opinion on petition for rehearing

PER CURIAM.

We have received and have given careful consideration to the supplemental briefs submitted by the parties in accordance with our memorandum filed May 17, 1963, and the brief submitted by the Attorney General of the State of New York, as *amicus curiae*. We reaffirm the views expressed in our original opinion and deny the petition for rehearing. There will be no further oral argument.

It is quite true that no New York court has ever stated the applicable rule in precisely the manner formulated by us. On the other hand, no case seems to have arisen presenting the special factual situation now before us and the claim that the rule announced by us is at odds with the legislative policy and the trend of law in New York is not supported by the authorities cited to us.[1]

We do not find the arguments advanced in opposition to our legal analysis of the case either persuasive or substantial. If the reason for the doctrine of governmental immunity ceases to exist in a given factual situation, we do no more than hold that the doctrine becomes inapplicable. The authorities now pressed upon our attention are all distinguishable and we cite them in the footnote merely for

1. New York Court of Claims Act, §8; Benz v. New York State Thruway Authority, 1961, 9 N. Y. 2d 486, 490, 215 N. Y. S. 2d 47, 174 N. E. 2d 727, cert. dismissed, 1962, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634; Matter of New York Post Corp. v. Moses, 1961, 10 N. Y. 2d 199, 203, 219 N. Y. S. 2d 7, 176 N. E. 2d 709; Matter of Brown v. Board of Trustees of Town of Hamptonburg, School District No. 4, 1952, 303 N. Y. 484, 488, 104 N. E. 2d 866, 34 A. L. R. 2d 720. The Attorney General also refers us to Easley v. New York State Thruway Authority, 1956, 1 N. Y. 2d 374, 378-379, 153 N. Y. S. 2d 28, 135 N. E. 2d 572;

purposes of reference.[2] What the principal argument of the District comes down to is that while we should adopt a reasonable application of the traditional governmental-proprietary distinction, at the same time intelligent jurisprudence must cease once the talismanic determination of "governmental" activity has been made.

The District earnestly assures us that the court below cannot conveniently make a finding on the remand to the effect that the attachment levy will or will not "substantially interfere with the performance of essential public functions" by the District, because an inquiry into the facts will be too "difficult," that the rule we have formulated is not "workable" or "practical." We had thought this bugaboo had long since been laid to rest. This argument has been advanced for generations and always to frustrate the doing of substantial justice whenever the

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2. Court of Claims Act, §20(3); Comment, 17 Cornell L. Q. 254 (1932); 10 Carmody-Wait, Cyclopedia of New York Practice, §91, page 135 (1954); 1 Dillon, Municipal Corporations, §248 (5th ed. 1911); Fordham, Local Government Law, page 623 (1949); Fordham, Garnishment of Public Corporations, 39 W. Va. L. Q. 224, 225 (1933); Larson v. Domestic & Foreign Commerce Corp., 1949, 337 U. S. 682, 704-705, 69 S. Ct. 1457, 93 L. Ed. 1628; Ashton v. Cameron County Water Improvement District No. 1, 1936, 298 U. S. 513, 534, 56 S. Ct. 892, 80 L. Ed. 1309 (dissenting opinion); East St. Louis v. United States ex rel. Zebley, 1884, 110 U. S. 321, 324-325, 4 S. Ct. 21, 28 L. Ed. 162; Murdoch v. City of Asbury Park, S. D. N. Y., 1942, 48 F. Supp. 18; Leonard v. City of Brooklyn, 1877, 71 N. Y. 498, 504; Matter of Deansville Cemetery Ass'n, 1876, 66 N. Y. 569, 572; City of Beacon v. County of Dutchess, 285 App. Div. 1050, 139 N. Y. S. 2d 462 (2d Dep't 1955); Matter of Donner-Hanna Coke Corp. v. Eberhardt, 156 Misc. 41, 42-43, 280 N. Y. S. 607, 609 (Sup. Ct. 1935).

The Attorney General also relies upon Darlington v. City of New York, 1865, 31 N. Y. 164, 192-193, and the trilogy of New York attachment cases discussed in our original opinion (Van Horn, Harman and Doyle).

facts of a given situation are complicated. But the courts have managed to deal successfully with matters far more intricate. We think the rule we have formulated is sufficiently precise and of such limited scope that it can be applied on the remand without delay or inconvenience, especially in the light of the explicit guidelines we have already set forth.

That New York's financial community will suffer as the result of our decision in this case we gravely doubt. And the suggestion that our ruling will adversely influence the fate of funds of New York governmental instrumentalities in other States seems to us to be even more farfetched.

We had not intended to do more than afford the parties an opportunity to advance such contentions as they might wish to submit relative to the novel features of the principles developed in our original opinion. But the District has included a new point not raised in the court below or in the briefs and oral argument on the appeal from Judge Noonan's order, to the effect that it is a substantive condition of the Washington statute creating the District (Revised Code of Washington, Title 54.16.110) that it may not be sued in the New York forum; and that, notwithstanding the New York rule as to governmental immunity from attachment levy, and despite the substantial contacts which New York has with the transactions here involved, the Full Faith and Credit Clause, Article IV, Section 1 of the United States Constitution, requires the dismissal of this action. We reject this contention, not only because not within the ambit of our memorandum filed May 17, 1963, but also for the reason that the highest court of the State of Washington has authoritatively construed the state statute relied upon to concern only the procedural

matter of venue and to raise no substantive jurisdictional issues. Public Utility District No. 1 of Kitsap County v. Puget Sound Power & Light Co., 1953, 43 Wash. 2d 1, 260 P. 2d 315.[3] See Tennessee Coal, Iron & R. R. Co. v. George, 1914, 233 U. S. 354, 34 S. Ct. 587, 58 L. Ed. 997.[4]

Petition for rehearing denied.

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3. The Washington court reached this conclusion despite the fact that Laws of 1931, Chapter 1, §6(k), p. 18, provided that "all suits against the public utility district shall be brought in the county in which the public utility district is located." The court noted, 43 Wash. 2d at 3, 260 P. 2d at 317, that the original Revised Code of Washington (adopted by the 1950 Extraordinary Session of the Legislature) substituted the word "may" for the word "shall." Contrary to the District's contention that this case construed a "predecessor statute," the Legislature's retention of the word "may" by Enacted Laws 1955, Chapter 390, §12, p. 409, only confirms that the result there reached is determinative of the present state of the law.

4. The New York rule on the issue of whether a foreign governmental body has a local situs so that it cannot be sued outside its own territorial limits, discussed in footnote eleven of our original opinion, seems to have been settled by the New York courts in Van Horn v. Kittitas County, Wash., 28 Misc. 333, 59 N. Y. S. 883 (Sup. Ct. 1899), aff'd mem., 46 App. Div. 623, 61 N. Y. S. 1150 (1st Dep't 1899). At any rate, questions of venue or *forum non conveniens* have not been raised properly and cannot be considered by us at this time.

Appendix A

Order denying petition for rehearing *en banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MERRITT-CHAPMAN & SCOTT CORPORATION,
Plaintiff-Appellant,

v.

PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON,
Defendant-Appellee.

PETITION FOR REHEARING *IN BANC*

Root, Barrett, Cohen, Knapp & Smith, New York, N. Y. and Washington & Wickwire, Ephrata, Washington, for defendant-appellee.

All of the active judges concurring, except Judges Clark, Moore and Hays who vote to grant (Judge Friendly not participating in the consideration of the petition), the petition is denied.

Leonard P. Moore
Acting Chief Judge.

6 August, 1963.

APPENDIX B

New York Civil Practice Act

§912. Duties of sheriff in execution of warrant. The sheriff must execute the warrant immediately, by levying, in the manner prescribed in section nine hundred and seventeen of this act, upon so much of the property of the defendant, within his county, not exempt from levy and sale by virtue of an execution unless by law specifically made subject to attachment notwithstanding such exemption, as will satisfy the plaintiff's demand, with the costs and expenses.

If levy be made upon personal property capable of manual delivery by the sheriff taking the same into his actual custody, he must, without delay, deliver to the person, if any, from whose possession the property is taken, a certified copy of the warrant. In all other cases where personal property is levied upon by him, the sheriff must, upon making such levy, or as soon thereafter as may be practical, take into his actual custody all personal property capable of manual delivery, and, without delay, subject to the direction of the court or judge, collect, receive and enforce all debts, effects and things in action levied upon by him.

The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as may be necessary, until the amount of plaintiff's demand for which the warrant was granted, with the costs and expenses, has been levied upon or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

Subsequent levies under a warrant shall not apply to any property previously levied upon under the same warrant.

Appendix B

New York Civil Practice Law and Rules

§6202. Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 104 shall be construed to mean "defendant."

§5201. Debt or property subject to enforcement; proper garnishee. (a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

(b) Property against which a money judgment may be enforced. A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from application to the satisfaction of the judgment. A money judgment entered upon a joint liability of two or more persons may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered.

Appendix B

Preamble of the statute of the State of Washington pursuant to which petitioner was established

Washington Laws 1931, ch. 1, §1. The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

Appendix B

Act of Congress authorizing the activity giving rise to this lawsuit

Public Law 544 (Laws of 83rd Cong., 2d Sess., c. 589, 68 Stat. 573).

AN ACT

To provide for the development of the Priest Rapids site on the Columbia River, Washington, under a license issued pursuant to the Federal Power Act.

Be it enacted by the Senate and House of Representatives of United States of America in Congress assembled, That the Flood Control Act of 1950 (64 Stat. 170, 179), insofar as it adopted and authorized to be prosecuted the Priest Rapids Dam on the Columbia River, Washington, substantially in accordance with the plans recommended in the report of the Chief of Engineers dated June 28, 1949, contained in House Document Numbered 531, Eighty-first Congress, second session, is hereby modified to permit the development of the Priest Rapids site by Public Utility District Number 2, of Grant County, Washington, or such district or its successor in combination with such other utilities as it may legally affiliate with or by any division, subdivision, agency, or commission of the State of Washington under and in accordance with the terms and conditions of a license duly issued pursuant to the Federal Power Act and in accordance with this Act.

SEC. 2. The Priest Rapids Reservoir site shall be developed to utilize the optimum capabilities of the site as a part of the comprehensive plan for economically feasible

control and utilization of the water resources for flood control, navigation, power, and other beneficial purposes. Before a license is issued, an applicant for a license shall submit a report on the details of its plans for development to the Federal Power Commission with particular reference to the integration of the proposed Priest Rapids development as a part of the comprehensive plan.

SEC. 3. The Department of the Army shall review any plans submitted to the Federal Power Commission for the purpose of acquiring a license to develop the Priest Rapids site or any other site in connection therewith and shall make recommendations with respect to such plans to the Commission with particular regard to flood control and navigation.

SEC. 4. The license may provide for the addition of navigation locks and flood-control features by the Department of the Army at Federal expense, either as a part of the initial construction or at a later date. In the event that nonpower features are to be provided as part of the initial construction, an allocation of costs to such features shall be approved by the Federal Power Commission taking into consideration recommendations by the Department of the Army and licensee, and funds to cover such costs may be appropriated and may be transferred by the Chief of Engineers to the licensee. If such navigation and flood-control facilities are not provided initially the licensee shall provide at its own expense the basic features for future installation of navigation and flood-control facilities.

SEC. 5. Upon request by the licensee the Corps of Engineers under direction of the Secretary of the Army shall be

authorized to receive contributed funds and act as constructing agency for part or all of the project, including acquisition of lands, easements, rights-of-way, or other interest in land in accordance with Federal laws and procedures governing flood-control projects and subsequent conveyance thereof to the licensee.

SEC. 6. The operation and maintenance of a project under license pursuant to this Act shall be subject to reasonable rules and regulations by the Secretary of the Army in the interest of flood control and navigation. To assure that there shall be no discrimination between States in the area served by the project, such license shall provide that the licensee shall offer a reasonable portion of the power capacity and a reasonable portion of the power output of the project for sale within the economic market area in neighboring States and shall cooperate with agencies in such States to insure compliance with this requirement; *Provided*, That in the event of disagreement between the licensee and the power marketing agencies (public or private) in any of the other States within the economic market area, the Federal Power Commission may determine and fix the applicable portion of power capacity and power output to be made available hereunder and the terms applicable thereto. Power surplus to the requirements of the licensee and other non-Federal marketing agencies (public or private) within the economic marketing area, as may be economically usable to the Federal system, may be made available to and may be purchased by the Bonneville Power Administrator at rates not higher than the rates charged such non-Federal marketing agencies, and under such terms and conditions as shall be mutually agreeable to the licensee and the Secretary of the Interior. Such power may be co-

mingled with power from Federal dams in the Columbia River system for which the Bonneville Power Administrator has been designated marketing agent and shall be sold by the Administrator in accordance with the provisions of the Bonneville Project Act at established rate schedules.

SEC. 7. If an application for a preliminary permit for a license under the Federal Power Act to authorize the development of the Priest Rapids site is not prosecuted with reasonable diligence before the Federal Power Commission and in any event if the license application is not filed with the Federal Power Commission prior to the date which is two years after the date of the enactment of this Act, the provisions of this Act shall not be effective after such date and the authorization for the development of the Priest Rapids site contained in the Flood Control Act of 1950 shall have the same status it would have had if this Act had not been enacted. In the event an application for a license is made and denied by the Federal Power Commission, or if construction under a license is not carried out in a reasonable period of time as determined by the Federal Power Commission, the authorization in the Flood Control Act of 1950 will have the same status it would have had if this Act had not been enacted. Notwithstanding any other provision of law, the Federal Power Commission shall act, on any such application filed with it prior to such date, within one year after the date on which such application is filed.

Approved July 27, 1954.

Appendix B

Washington Statutes authorizing suit against petitioner and establishing that its property is not subject to execution

Rev. Code Wash. 54.16.110 May sue and be sued—Claims. A district may sue in any court of competent jurisdiction, and may be sued in the county in which it is located. No suit for damages shall be maintained against a district except on a claim filed with the commission complying in all respects with the terms and requirements for claims for damages filed against cities of the second class.

Rev. Code Wash. 6.04.140 Enforcement of judgment against public corporations. If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:

(1) The party in whose favor such judgment is given may at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof.

(2) On the presentation of such transcript such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation.

(3) The certified transcript herein provided for shall not be furnished by the clerk unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as ~~in~~ ordinary cases. The clerk shall include in the transcript the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon.

Rev. Code Wash. 6.04.150 Attachment to compel officer to satisfy judgment. Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in RCW 6.04.140 provided, an attachment [body attachment] may be issued to compel his performance of said duty.

APPENDIX C

List of representative bonds issued by governmental instrumentalities to finance public projects, where construction funds were held by New York banks pursuant to provisions similar to those here involved.

Issue	*Depositary*	*Purpose of Issue*	*Amount of Issue*
CHELAN COUNTY (WASHINGTON) PUBLIC UTILITY DISTRICT No. 1			
Rocky Reach Hydro-Electric System Revenue Bonds, Series of 1956, dated 11/1/56, due 1992	Chemical Bank New York Trust Co.	Construction of hydro-electric power project with a capacity of 710,000 k.w. on Columbia River.	$ 23,100,000
Rocky Reach Hydro-Electric System Revenue Bonds, Series of 1957, dated 12/15/57, due 2013	Chemical Bank New York Trust Co.	Completion of 775,000 k.w. hydro-electric power project on Columbia River.	$ 250,000,000
DADE COUNTY (FLORIDA) PORT AUTHORITY			
3⅛% Series A Bonds dated 10/1/54, due 1979	Chase Manhattan Bank	Acquisition of additional land for new construction and improvements at Miami International Airport.	$ 21,000,000
4.70% Series B Bonds dated 10/1/59, due 1999	Chase Manhattan Bank	Improvements to Miami International Airport.	$ 19,200,000
DOUGLAS COUNTY (WASHINGTON) PUBLIC UTILITY DISTRICT No. 1			
Wells Hydro-Electric Revenue Bonds, Series of 1963, dated 9/1/63, various interest rates due serially 1974/91, 4% term bonds due 2018	Chemical Bank New York Trust Co.	Construction of electric generating plant and associated facilities on Columbia River.	$ 184,000,000

JACKSONVILLE (FLORIDA) EXPRESSWAY AUTHORITY			
Expressway Revenue Bonds Series 1957, various interest rates, dated 1/1/57 due serially to 1977 and term bonds 1992	Morgan Guaranty Trust Company	Construction of certain extensions to expressway system.	$ 70,000,000
KANSAS TURNPIKE AUTHORITY			
Turnpike Revenue 3.38% Bonds dated 10/1/54, due 1994	Morgan Guaranty Trust Company	Construction of modern express highway extending from Eighteenth Street in Kansas City, Kansas to the Kansas-Oklahoma border by way of Lawrence, Topeka, Emporia, El Dorado and Wichita, Kansas.	$ 160,000,000
Kansas City Expressway Revenue Bonds dated 8/1/57. 5% due serially 1961/70, 4½% due serially 1971/3, 4⅜% due 1997	Morgan Guaranty Trust Company	Construction of Kansas City Expressway, extending southward on 18th St., Kansas City, Kansas from a junction with Kansas Turnpike at Muncie Expressway over Kansas River into Johnson County to a point on Roe Ave. south of Johnson Drive.	$ 19,500,000
NEW JERSEY TURNPIKE AUTHORITY			
Turnpike Revenue Bonds, 3¼% (1950 Issue) dated 1/1/50, due 1985	Chase Manhattan Bank	Construction of original New Jersey Turnpike.	$ 220,000,000
Turnpike Revenue Bonds, 3.20% (1951 Issue) dated 7/1/51, due 1986	Chase Manhattan Bank	Completion of original New Jersey Turnpike.	$ 35,000,000
OHIO TURNPIKE COMMISSION			
State of Ohio Turnpike Revenue Bonds, Project No. 1, 3¼%, dated 6/1/52 due 1992	First National City Bank	Construction of Turnpike extending 241 miles across Northern Ohio from western terminus of Pennsylvania Turnpike to the Indiana line.	$ 326,000,000

Appendix C

Issue	*Depositary*	*Purpose of Issue*	*Amount of Issue*
PUERTO RICO AQUEDUCT AND SEWER AUTHORITY			
Revenue Bonds (various interest rates), Series 1957	Chase Manhattan Bank	Construction of and improvements to water supply systems, filtration plants, mains and other projects including wells, reservoirs, pumping and other facilities and sewer lines.	$ 12,000,000
Revenue Bonds (various interest rates), Series 1960	Chase Manhattan Bank		$ 10,000,000
Revenue Bonds (various interest rates), Series 1962	Chase Manhattan Bank		$ 14,000,000
PUERTO RICO WATER RESOURCES AUTHORITY			
Twenty-four issues issued at various times during period 1947/63	First National City Bank	Electrical construction and improvement and extension programs.	$ 305,485,000 (aggregate)
TRUSTEES OF THE TULSA MUNICIPAL AIRPORT TRUST			
Revenue Bonds 4½% Series 1958, dated 6/1/58, due 1983	Chase Manhattan Bank	Improvements to American Airlines, Inc. base at Tulsa Municipal Airport.	$ 20,500,000
WEST VIRGINIA TURNPIKE COMMISSION			
State of West Virginia Turnpike Revenue 3¼%, 4⅛% Series A Bonds dated 3/1/52, due 1989	Morgan Guaranty Trust Company	Construction of 88-mile expressway from Charleston to Princeton, W. Va.	$ 133,000,000
		TOTAL	$1,822,785,000